IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

JOHN SZEKELY, also known professionally as JOHN PEN,
*Respondent,*

v.

EAGLE LION FILMS, INC.,
*Petitioner,*

AND

GENERAL FILM DISTRIBUTORS, LTD., J. ARTHUR RANK, ROD GEIGER and NAT BRONSTEN,
*Defendants.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement

Petitioner, Eagle Lion Films, Inc. (Eagle Lion) seeks to have this court review the judgment of the Court of Appeals for the Second Circuit [1] [Charles E. Clark, Chief Judge, Harold R. Medina, Circuit Judge, and J. Joseph Smith, District Judge] which unanimously affirmed the

[1] Reported at 242 F. 2d 266, Appendix A-1-A-6.

judgment of the District Court for the Southern District of New York [2] [Archie Owen Dawson, District Judge], awarding respondent, John Szekely, also known professionally as John Pen (Szekely), the sum of $25,000 with interest as damages against petitioner for infringement of common law literary property rights. Rehearing was unanimously denied by *Per Curiam* order of the Court of Appeals dated and filed April 10, 1957.

**There Is Neither a Statute Nor a Treaty of the United States, Nor Any Constitutional Issue, Nor Any Deviation by the Courts Below From Any Accepted and Usual Legal Norms of Judicial Determination, Involved in This Instant Petition for Certiorari. Accordingly, This Honorable Court Should Refuse to Assume Jurisdiction Over This Cause, and Deny the Petition**

Respondent, Szekely, instituted suit in the District Court for the Southern District of New York for petitioner Eagle Lion's willful and intentional infringement, with knowledge, of his common law rights of literary property under the laws of the State of New York.

Jurisdiction of the District Court was based *solely upon diversity of citizenship* [3] existing as between all parties to the suit, and the amount in controversy being in excess of statutory requirements. In all the proceedings in the courts below, respondent Szekely's suit was treated solely as an action for the willful and deliberate conversion,

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[2] Reported at 140 F. Supp. 843, Appendix 9a-24a.

[3] Respondent, Szekely, at the time suit began, was a citizen of New York, and of the appearing defendants, petitioner, Eagle Lion was an Ohio corporation, and Rod Geiger was a citizen of California (pp. 30a-31a).

with knowledge, by Eagle Lion of Szekely's common law rights in literary property, which is no different than other personal property.

Neither the Act of July 30, 1947, c. 391, 61 Stat. 652, 17 U. S. C., §1 *et seq.*, commonly known as the Copyright Act, nor any other statute or treaty of the United States, was involved as the basis of, or controlling, the rights of Szekely's action in any proceedings in the courts below. The only reference to the Copyright Act by the courts below is made in the District Court's opinion (p. 18a) merely by way of incidental recognition that Szekely's common law rights in his dramatization were such as would entitle him to statutory protection under Section 7 of the Copyright Act, if, of course, he had registered under it. The mention by the trial court of the Copyright Act was merely a passing incident in its legal discussion, and never formed the basis for any of Szekely's rights or common law chose in action *ex delicto*.

It is apparent from the face of the petition that no question involving the United States Constitution has been raised.

Nor is there any disclosure of any departure by the courts below from the accepted and usual legal norms of judicial determination. It is evident from the opinions below, and as hereinafter demonstrated, that the unanimous decisions of the Court of Appeals and the District Court are in complete consonance with established controlling principles of federal and state law, as embodied in the decisions of the courts of the State of New York, and in the various federal courts throughout the nation, including this Honorable Court. There is absolutely no conflict of opinion and authority between the Court of Appeals for the Second Circuit and any other court, state or federal, as to the controlling legal principles governing

the determination of this instant case. And any question raised by petitioner herein is so well settled by judicial precedent that it would not be in the public interest to have it passed upon by this court.

In light of Rule 19 of this court, 28 U. S. C. A., and the standards governing review on certiorari, it is manifest that this case is *not* one in which "there are special and important reasons" for granting the writ, as required by such rule. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 73-74, 79 (1955), dismissing, as improvidently issued, a writ of certiorari previously granted.

Mr. Chief Justice Taft, in *Magnum Import Co.* v. *Coty*, 262 U. S. 159 (1923), stated the controlling principles governing certiorari as follows (p. 163):

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.*" (Emphasis supplied.)

Accord: *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393; *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 73-74, 79.

This court, in the light of the considerations governing review on certiorari, as applied to the situation at bar, should deny the instant petition.

## The Lack of Merit in Eagle Lion's Petition

There is no merit whatsoever in the instant petition of Eagle Lion for a writ of certiorari. It is replete with flagrant distortions and misleading truncations of the indisputable and established facts, artificial purported contradictions of undisputed facts, sophistical argumentation, and the assertion of strained, perverted, and vague general propositions outside of any realistic frame of reference to the facts determinative of their applicability, as well as a confusion of "issues".

## The Facts

The salient, indisputable, and established facts as unanimously found by the courts below are as follows:

Some time in 1937, Pietro Di Donato wrote a novel entitled "Christ in Concrete", published by Bobbs-Merrill, and copyrighted in 1937 and 1939 (pp. 10a, A-2). Subsequently, Rod E. Geiger Productions, Inc. (Geiger Productions) acquired from Di Donato an exclusive license to make a film based upon Di Donato's book (pp. 10a, A-2).

Thereafter, Geiger Productions engaged respondent, Szekely, an Academy-Award-winning writer of recognized stature and reputation to write, and Szekely did write, a screen play based upon the book "Christ in Concrete" (pp. 10a, A-2).

Under the terms of his contract with Geiger Productions, respondent, Szekely, was to receive an aggregate of $35,000 and 5% of the producer's share of net profits from the film. Szekely retained all rights and title in his screen play until he received the minimal sum of $35,000 (pp. 11a, A-2, Pl. Ex. 5, p. 48a, R. p. 37).

It is undisputed that Szekely received only $10,000 from Geiger Productions, and that the $25,000 balance, upon payment of which Szekely's rights in his manuscript would pass to Geiger Productions, was never paid [4] (pp. 11a, A-2).

After Szekely presented the final draft of his script to Geiger Productions, in 1948, Geiger ran into financial difficulties, and found it necessary to revise production plans. Geiger also hired Ben Barzman, a local writer, in England, in 1948, as script editor (pp. 11a, A-2, Pl. Ex. 9, p. 57a, R. p. 58). In 1949, the filming of the picture began, at which time Szekely was informed by Geiger that *no part of Szekely's screenplay was being used in the motion picture version of the novel* (pp. 12a, A-2, Pl. Ex. 13, p. 58a, R. pp. 154, 155, Pl. Ex. 14, p. 60a, R. p. 165).

Geiger Productions granted distribution rights to the film, entitled "Give Us This Day", to General Film Distributors, Ltd., of England, which in turn, subgranted Western Hemisphere distribution rights to Eagle Lion. The licensing agreement between General Film Distributors and Eagle Lion contained an assurance from General Film Distributors that such film would not infringe upon common law rights or copyrights (p. 13a, R. p. 71).

In November, 1949, *nearly a month prior* to Eagle Lion's distribution of the film, respondent, Szekely, notified Eagle Lion, by letter dated November 29, 1949 (Pl. Ex. 6, p. 53a,

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[4] Respondent, Szekely, never overlooked any defaults in payment by Geiger Productions as suggested in petitioner's brief (p. 5). Since respondent had received $10,000 from Geiger Productions, it was reasonable for him to assume that all further payments would be forthcoming in the same good faith and fair dealing which attended payment to him of $10,000. However, when respondent finally pressed for payment, Geiger Productions informed him that "the present production plans in England has [sic] an entirely new script and containing no part of Mr. Pen's work" (Pl. Ex. 13, p. 58a, R. pp. 154-155, Pl. Ex. 14, p. 60a, R. p. 165).

R. pp. 198-199) of his rights in the premises, and specifically put Eagle Lion on notice that unless arrangements were made with respect to respondent's rights, he would be obliged to take such steps as necessary for the protection of his property rights, including commencement of injunction proceedings against the exhibition of such film with his work included (pp. 13a-14a, A-2–A-3, Pl. Ex. 6, p. 53a, R. pp. 198-199).

Thereafter, and on or about December 20, 1949—*nearly a month after respondent's prior letter of notification*—and in utter disregard of respondent Szekely's rights, Eagle Lion released the film for general distribution throughout the United States and in various other countries of the Western Hemisphere (pp. 13a, A-2, R. pp. 51-52). And this was done despite further notice to Eagle Lion of Szekely's rights in the form of a credit to respondent for the "adaptation", which was emblazoned on the film itself. Besides, newspaper reviews of the film on the day following the initial release, Eagle Lion's own documentary evidence, produced from its own files—Defendant's Exhibit E—contain the following credits:

> "An Eagle Lion Film release. Produced by Rod E. Geiger and N. A. Bronsten. Directed by Edward Dmytryk. Screen play by Ben Barzman. *Adapted by John Penn.* From the novel by Pietro Di Donato." [N. Y. Post, p. 60; N. Y. Journal-American, p. 21; issues of December 21, 1949; Def. Ex. E, 14a, R. p. 105; emphasis supplied.]

Despite respondent Szekely's clear written notice of November 29, 1949, and the notice of credit to respondent as "adapter" imprinted on the film itself, and published in the newspaper reviews of the film, and despite further written notice from Szekely to Eagle Lion, by letter dated February 7, 1950 (Pl. Ex. 7, pp. 54a, 14a, A-3, R. p. 20),

of Szekely's rights in his screenplay, and that such rights were still his property, and never disposed of, Eagle Lion, nevertheless, intentionally and defiantly continued its distribution of the film, which commenced December 20, 1949, and in fact distributed the film for some years after suit was commenced on April 18, 1950 (pp. 15a, A-3).[5]

Both the District Court and the Court of Appeals found as facts, based upon Eagle Lion's *own* accounting reports to General Film Distributors, Eagle Lion's Exhibits I and J (R. pp. 236-237), that the total gross receipts realized by Eagle Lion from distribution of the film was $46,719.84, and that the producer's (Geiger's) share of gross receipts from distribution was *$29,758.04* (pp. 15a, 21a, A-4).[6] Eagle Lion received in excess of $25,000 for

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[5] It is sheer hyprocrisy for petitioner, Eagle Lion, to contend that it never had notice of respondent Szekely's claim of title until February 7, 1950, in the face of the overwhelming evidence in the record and the unanimous findings by two courts below that "* * * Eagle Lion had notice of plaintiff's [Szekely's] claim several weeks prior to the first distribution and chose to ignore it, and there was other evidence that distribution continued after further warning, and, indeed, for some years after suit was brought" (Opinion, Smith, J., p. 871, A-3), and in the face of respondent's letter of notification dated November 29, 1949, and the credit given to Szekely for an "adaptation" *on the film itself and in the newspaper reviews* of December 21, 1949—the day following the initial release of the film. Under settled law, Eagle Lion is chargeable with full knowledge of all the facts which a diligent and timely inquiry by it would have disclosed. *Fidelity & Deposit Co.* v. *Queens County Trust Co.*, 226 N. Y. 225, 233; *Williamson* v. *Brown*, 15 N. Y. 354, 362.

[6] Petitioner's misleading statement at p. 7 of its brief that only $1320.76 was remitted to General Film Distributors can in no fashion diminish the unassailable facts as found by two courts below—that Eagle Lion collected $29,758.04 for the account of the producer, Geiger Productions, with whom it stood *"in pari delicto"*. Eagle Lion deducted certain costs, such as positive prints, advertising, shipping, laboratory costs, etc., from, and set them off against producer's share of gross receipts, thereby reimbursing itself from the aforementioned $29,758.04 percentage share of gross receipts which Eagle Lion

the account of Geiger Productions, which, as Eagle Lion knew, had also infringed upon Szekely's rights. Therefore, as recognized by the trial court (p. 22a), Eagle Lion stands *"in pari delicto"* with Geiger Productions—both being willful, deliberate infringers who realized in excess of the $25,000 security title held by Szekely, from their tortious utilization of Szekely's manuscript (pp. 21a, A-4).

Both the District Court and the Court of Appeals found as a fact that Eagle Lion was an intentional and deliberate infringer, with notice of Szekely's rights. In the face of such judicial determinations, Eagle Lion's contention that it was merely an "innocent distributor" is a flagrant falsehood, and an insult to the intelligence of this court.

## POINT I

**Eagle Lion's *intentional and deliberate* distribution, with notice of respondent's rights, and without his consent, of a film containing respondent's screen play, title to which respondent *retained as security* for payment to him of $25,000.00, completely destroyed the value of such security title. By destroying the value of respondent's rights in his screen play, Eagle Lion damaged respondent to the extent of at least $25,000.00, as correctly held by the District Court and the Court of Appeals.**

The unassailable facts, as unanimously found by the two courts below, clearly show that Eagle Lion was an

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had collected for the account of Geiger Productions. The fact that Eagle Lion reimbursed itself out of such producer's share of receipts instead of paying over such sum, does not alter the fact that Geiger Productions' interest in moneys collected for its account by Eagle Lion was $29,758.04 (Def. Exs. I and J, R., pp. 236-237, pp. 15a, 21a, A-4).

*intentional and willful* infringer of respondent's literary property as embodied in the film which Eagle Lion distributed, with actual knowledge and notice of respondent's rights therein.

By letter dated November 29, 1949 (Pl. Ex. 6, p. 53a, R. pp. 198-199), Eagle Lion was given notice of respondent's rights *several weeks prior* to the initial release of the film, which was December 20, 1949. The *very film itself and newspaper reviews* following the first showing of the film gave respondent credit for an "adaptation" (Def. Ex. E, R. p. 105, N. Y. Post, p. 60, N. Y. Journal-American, p. 21, issues of December 21, 1949). And at the trial of this action, counsel for Eagle Lion brazenly acknowledged to the trial court that under the distribution agreement between Eagle Lion and General Film Distributors, "each year Eagle Lion *had the right to choose a number of pictures* distributed by General Film Distributors, Ltd. in England." *One of the films which Eagle Lion specifically chose to distribute,* under its contract with General Film Distributors *was the infringing motion picture* (R. pp. 69-70, 288). Thus, despite its knowledge of respondent's rights, Eagle Lion *deliberately* chose to distribute the infringing film, evidently relying on the warranty in its distribution agreement that such film would not infringe upon common law rights or copyrights (R. p. 71, Dist. Ct. Finding 14, p. 13a).

**Liability of Eagle Lion**

Eagle Lion's liability was predicated upon its intentional and deliberate distribution, with notice, of an infringing motion picture. *E. g.: Kalem Company* v. *Harper Brothers,* 222 U. S. 55 at 62-63; *Underhill* v. *Schenck,* 238 N. Y. 7 at 17. Respondent, as the owner of literary property willfully and intentionally converted by peti-

tioner, Eagle Lion, was thus entitled to an award of damages for the tortious conversion of his property. *DeAcosta* v. *Brown*, C. C. A., 2nd Cir., 146 F. 2d 408, cert. den. 325 U. S. 862.

**Measure of Damages**

At the time of Eagle Lion's tortious conversion of respondent's rights in his screen play, respondent still retained title to his screen play *as security* for the payment to him of $25,000. As far as respondent, Szekely, was concerned, this security title was worth at least $25,000—for it meant that no one in the world could use respondent's screen play unless and until respondent received the sum of $25,000.

Obviously, so long as Geiger Productions held the film rights to the novel, Szekely could only sell his screen play to Geiger Productions. But as long as the film containing Szekely's screen play remained unpublished and undistributed, Szekely and Geiger Productions *jointly* could sell their aggregate property rights as a single "salable bundle" to anyone. Eagle Lion, which had actual knowledge that it had no rights to distribute a film containing Szekely's screen play was itself a potential buyer for Szekely's rights. Knowing, as Eagle Lion well did, that it had no authority to commence the distribution of the film, Eagle Lion, under its blanket distribution contract with General Film Distributors could have *chosen and substituted* another film, in substitution for this one, to distribute (R. pp. 69-70, 288). Instead, Eagle Lion deliberately chose to distribute the film (R. pp. 69-70, 288), presumably relying on the assurances of title and obligations of indemnity in its distribution agreement. In so doing, Eagle Lion destroyed Szekely's security rights in his screen play and any potential market for such rights.

The legal injury to respondent, as stated by the Court of Appeals (A-6), was certain. Eagle Lion's distribution of the film destroyed a legally protected interest worth at least $25,000.00 by rendering respondent's security title to his screen play worthless. As this high court and other courts invariably have recognized, certainty of *cause* of damage is not to be confounded with mere elements of uncertainty in the computation of damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 263-268; *Wakeman* v. *Wheeler and Wilson Mfg. Co.*, 101 N. Y. 205, 209. And even where elements of uncertainty in computing damages exist, a court "may make a just and reasonable estimate of the damages based on relevant data, and render its verdict accordingly." *Bigelow* v. *RKO Radio Pictures, Inc., supra*, p. 264. For, as this high tribunal went on to state in the *Bigelow* case, *supra*, pp. 264-265:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery.
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> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created * * *.
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> " 'The constant tendency of the courts is to find someway in which damages can be awarded where wrong has been done. Difficulty of its ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

In measuring damages sustained by the owner of converted property, the value of the property converted may, in law, be measured in terms of the "value to the owner". Restatement of the Law, Torts §911, Comment (e), §927 (c). The owner of literary property may testify, as respondent Szekely did in the case at bar, as to the property's worth and value to him, in computing the loss sustained by him, and that his property was rendered valueless by the unauthorized use of it.

*Taft* v. *Smith, Gray & Co.*, 76 Misc. 283, 284-285, App. Term, N. Y. Supreme Court, 1st Dept.;
*MacGregor* v. *Watts*, 254 App. Div. 904, 2nd Dept.;
*Golding* v. *RKO Pictures, Inc.*, 35 Cal. 2nd 690, 701; 221 P. 2d 95;
*Kovacs* v. *Mutual Broadcasting System, Inc.*, 99 Cal. App. 2d 56, 67; 221 P. 2d 108;
*Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal. 2nd 653, 661; 221 P. 2d 73.

In a variety of cases, the courts have sustained awards of substantial damages on evidence of valuation given by the owner of the literary or artistic property wrongfully invaded. *E.g.*: $25,000 award upheld: *Golding* v. *RKO Pictures, Inc.*, 35 Cal. 2nd 690; 221 P. 2nd 95; $40,000 award sustained: *Universal Pictures Co.* v. *Harold Lloyd Corp.*, C. C. A. 9th Cir., 162 F. 2nd 354, where defendant unlawfully appropriated about 20% of plaintiff's film property; $25,000 judgment entered: *Kovacs* v. *Mutual Broadcasting System, Inc.*, 99 Cal. App. 2nd 56; 221 P. 2nd 108; $35,000 verdict affirmed; *Stanley* v. *Columbia Broadcasting System, Inc.*, 35 Cal. 2nd 653, 666-667, 221 P. 2nd 73.

In the course of his testimony, respondent Szekely estimated the value to him of his literary property in his

original screenplay, to be at least in the sum of $25,000.00, but at a maximum of $50,000.00. He gave such estimate of value as an expert witness and as an Academy Award winner and a professional author of unusual stature, standing and reputation, over a period of over thirty-five years. He testified that under his contract dated November 13, 1947, he was entitled to receive the fixed sum of $35,000.00, in cash and, in addition, "5% of the producer's share" of the net profits derived from the marketing and distribution of the film, based on his original screenplay. And in this connection, he emphasized that the producer of the film stated that respondent's 5% of the producer's share of the profits, would "amount to at least $15,000.00" (R. pp. 27-29, 54-56 *et passim;* pp. 46a-47a).

As Hon. Archie O. Dawson, the trial judge, stated in his opinion,[7] with the unanimous endorsement of approval by the Court of Appeals:[8]

> "The special value to the plaintiff [Szekely] was the *value of the security interest which he had in the manuscript and which was security for the payment to him of $25,000.* That at least was the value to the plaintiff of the property which was tortiously appropriated by the defendant [Eagle Lion]." (Emphasis and bracketed insertion supplied.)

And as both the District Court and the Court of Appeals recognized, the award of damages to respondent, Szekely, is sustainable also on the basis that respondent, as the victim of a tortious deprivation of his property rights in his manuscript, is entitled to receive, at the very least, "the exchange value of the subject matter or the plaintiff's [Szekely] interest therein at the time and place

[7] 140 F. Supp. 843, 849-850; 21a.

[8] 242 Fed. 2nd [Ad. Op.] 266, 269; A-4-A-6.

of the conversion or destruction, or a different value where that is necessary to give just compensation." Restatement of Law, Torts, §927(a) (pp. A-5-A-6, 20a, bracketed material supplied).

Evidence of such exchange value to respondent of his property rights in his screen play which was so deliberately appropriated and commercially exploited by petitioner, Eagle Lion, is readily found by reference to the minimum price of Thirty-Five Thousand ($35,000) Dollars as clearly fixed in the contract previously made between respondent, Szekely, and Geiger Productions in the course of open and arms-length bargaining and at a time long before any invasion of Szekely's rights and the existence of any dispute whatsoever. As prior to the invasion of respondent Szekely's property rights, Geiger Productions had paid him the sum of Ten Thousand Dollars ($10,000), the unpaid sum of Twenty-Five Thousand ($25,000.00) Dollars at the time of the conversion of his property rights represented precisely the exchange value to him. In a substantial legal sense, such sum of Twenty-Five Thousand ($25,000.00) Dollars represents, as unanimously held by the Court of Appeals, "the market value of that property * * * at the time of the conversion * * * supported by its appraisal by plaintiff [respondent] and Geiger in their dealings prior to the conversion." [A-6, bracketed insertion supplied.] Patently, such prior business negotiations between respondent, Szekely, and Geiger Productions and the price arrived at by their mutual agreement in the open market and at arms-length, and the surrounding circumstances at the time of the conversion constituted legally recognizable "relevant data" on which courts "may make a just and reasonable estimate of the damage." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 at 264.

The burden squarely rested on petitioner, Eagle Lion, as a deliberate and unconscionable piratical infringer of

respondent Szekely's literary property rights, to unscramble the elements of value in the film "Give Us This Day". *Sheldon* v. *Metro Goldwyn Pictures Corporation,* C. C. A., 2nd Cir., 106 Fed. 2nd, 45, 48; aff'd 1940, 309 U. S. 390. Such burden cannot be shifted by the wrongdoing petitioner, Eagle Lion, to its victim, respondent Szekely. Having utterly failed to avail itself of its opportunities in its "full day" in court to sustain its burden of proof to unscramble such elements of value in the film, petitioner, Eagle Lion, is conclusively bound by the proofs adduced by respondent, Szekely, which established his right to an award of damages in the sum of Twenty-Five Thousand ($25,000.00) Dollars as representing his security and exchange value for the literary property rights of which he was tortiously deprived by petitioner, Eagle Lion. Mere difficulty of ascertainment with absolute precision of the value of property rights destroyed—particularly when such difficulty arises largely from a tortious wrongdoer's acts of destruction, can never enable such wrongdoer to escape the moral and legal consequences of his wrongdoing without full compensation to the owner of the property rights involved as is reasonably determinable under the law. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U. S. 251, 263-266.

The award of damages as made by the District Court to respondent, Szekely and as unanimously affirmed by the Court of Appeals, represents a finding of fact, and, since it is supported by the evidence, is unassailable on appeal. *Sanders* v. *Leech,* C. C. A. 5th Cir. 1946, 158 F. 2nd 486, 487; *Brink's, Inc.* v. *Hoyt,* C. C. A. 8th Cir., 1950, 179 F. 2nd 355, 360; *Cleo Syrup Corp.* v. *Coca Cola Co.,* C. C. A., 8th Cir., 1943, 139 F. 2nd, 416, 417, cert. den. 321 U. S. 781.

If, as petitioner Eagle Lion, ludicrously contends, the imposition by the courts below of liability upon petitioner, Eagle Lion, for the payment of damages to respondent,

Szekely, for the tortious willful destruction of his property is "confiscatory", then all judicial determinations fixing responsibility upon tortious wrongdoers for payment of damages for the injuries intentionally inflicted by them must of necessity be in the same category of "confiscation." But, patently, Eagle Lion's cry of "confiscation" is wholly without merit in fact and law in the case at bar.

## POINT II

**There is absolutely no merit to Eagle Lion's contention that Szekely is estopped from claiming infringement and damages by reason of Eagle Lion's distribution activities.**

The facts at bar do not show respondent, Szekely, was guilty of any unreasonable delay in asserting his rights in his screen play and commencing this suit. On the contrary, respondent at all times acted with the utmost diligence in the protection of his rights.

Early in January, 1949, respondent, Szekely was specifically advised by Geiger Productions that "no part of the script which was prepared by Mr. Pen is being used in the production of the motion picture as presently planned" (pp. 12a, A-2, Pl. Ex. 14, p. 60a, R., p. 165). Subsequently, by letter dated February 1, 1949, Geiger again informed respondent that his screen play would not be used in the film, and at the same time, held out some hope to Szekely that payment would be made, and that Geiger Productions would "do everything to protect Mr. Pen" (pp. 12a, A-2, Pl. Ex. 13, p. 58a, R., pp. 154-155). As the trial court recognized:

> "Plaintiff's [Szekely] failure to seek to enjoin the filming operation in England is not such as can be called unreasonable, in view of the letters received by him from the attorney for Geiger. The first of these letters stated that no part of his script was

> being used in the production, which would certainly lull him into a belief that he had no cause of action. The other letter gave him hope that if the film was completed, payment would be made to him, but that no payment could then be made to him because of the ban on the export of dollars. These statements made it reasonable for plaintiff [Szekely] to withhold action until the film was produced in the hope that at that time, a payment would be made to him" (p. 18a, bracketed material supplied).

In November, 1949, respondent Szekely learned from publicity in United States newspapers that the film was produced and soon to be distributed, and promptly notified Eagle Lion of his rights by letter as early as November 29, 1949—nearly a month *prior* to Eagle Lion's release of the film for general distribution in the United States. Notwithstanding this written notice of respondent's rights *before* its first release of the film, and notwithstanding the notice plainly imprinted on the film itself, giving respondent credit for the "adaptation", Eagle Lion brazenly and deliberately *chose* to distribute the infringing film, beginning December 20, 1949.[9]

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[9] It is the height of disingenuousness for Eagle Lion to contend (p. 17n) that failure of respondent [Szekely] to prevent completion or distribution of the film entrapped Eagle Lion into distributing the film and incurring costs of distribution. This is so particularly in the light of (a) the credit given to respondent [Szekely] for the "adaptation" plainly imprinted on the film itself which gave Eagle Lion notice of respondent's literary rights long before Eagle Lion began releasing and distributing the film on December 20, 1949, (b) the notification given by respondent [Szekely] to Eagle Lion of his rights in his screen play by letter dated November 29, 1949—nearly a month prior to Eagle Lion's release of the film for general distribution in the United States, (c) the deliberate selection and distribution of the infringing film with knowledge of respondent's rights and relationship as adaptor to such infringing film, despite the fact that under its blanket distribution contract with General Film Distributors, Eagle Lion had the right to

And Eagle Lion deliberately proceeded with its distribution of the film in utter disregard of respondent's second letter, dated February 7, 1950 (pp. 14a, A-3, Pl. Ex. 7, p. 54a, R., p. 20), and the commencement of this action on April 18, 1950—only about four months after Eagle Lion first released the infringing film (pp. 15a, A-3)—*continuing its distribution for some years after this action was begun* (pp. A-3, 15a). Eagle Lion did this even though under its blanket distribution contract with General Film Distributors, Eagle Lion had the right to substitute for the infringing film any other film of the entire group of films embraced in such distribution contract (R., pp. 69-70, 288).

As the trial court held:

> "In any event, plaintiff [Szekely] did not sleep upon his rights. He asserted his claim. He instituted this action" (p. 19a).

Eagle Lion again urged this contrived so-called "estoppel defense" in its brief to the Court of Appeals, which, upon the established facts and law, rejected it:

> "Appellant's [Eagle Lion] second point is that plaintiff's [Szekely] deliberate inaction led to Eagle Lion's distribution of the film, and that plaintiff

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substitute another film from the group of pictures it had access to under such distribution contract, in place of the infringing film, and (d) the deliberate continuation of distribution by Eagle Lion *for several years* after December 21, 1949 when the newspaper reviews of that date gave respondent credit for an "adaptation," in gross willful defiance of respondent's further written notification and protest of February 7, 1950. The incontestable facts in the record sharply expose Eagle Lion's "entrapment" argument as sheer sham, made with crocodile tears. Clearly if under the circumstances at bar Eagle Lion was entrapped, then its entrapment is the result of its own piratical cupidity and its callous and reckless disregard of respondent's rights in his screen play (pp. 14a-15a, A-3-A-4, R., pp. 69-70, 288, Pl. Ex. 6, p. 53a, R., pp. 198-199, Pl. Ex. 7, p. 54a, R., p. 20, Def. Ex. E, R., p. 105, Def. Ex. I and J, R., pp. 236-237).

> [Szekely] is barred from recovery by estoppel and laches. It is difficult to see how this claim can be seriously advanced, for the [trial] court found, on competent evidence, that Eagle Lion had notice of plaintiff's claim several weeks prior to the first distribution and chose to ignore it, and there was other evidence that distribution continued after further warning and, indeed, for some years after suit was brought'' (p. A-3; bracketed material supplied).

This clear holding by the Court of Appeals, affirming the finding of fact of the District Court, is supported by the great weight of evidence in the record, and completely demolishes any contention by Eagle Lion that Szekely is estopped from asserting his claim.

## Conclusion

If ever there was a defeated litigant whose position was so palpably unworthy of the certiorari writ of this high court, it is unquestionably, Eagle Lion, the petitioner herein.

**The Petition Should Be Denied.**

Dated: June 7, 1957.

Respectfully submitted,

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